*tion*[1]. Moreover, by virtue of Article 6(1) (b) of the agreement under which the incentive fee is payable by the defendants, the payment must be made "on the basis of the results accounts" submitted to the defendants. The only evidence of "results accounts" before the court below are the accounts for April to November 1981 supplied by NOVOTEL to the defendants before the writ was filed which was annexed to their letter dated July 26, 1981. But as stated earlier, NOVOTEL have elected to limit their claim, which they are lawfully entitled to do, to four months from June to September, 1981. On their pleading and as well as affidavit evidence on the Order 14 application, we find NOVOTEL have claimed $300,000 from the defendants for outstanding management fees calculated on a basis of services rendered during four months of the interim period. To allow a judgment for more than four months period without amending the pleading would be contrary, to principle. Similarly, on their pleading and affidavit evidence the claim on incentive fee under Article 6(1)(b) has been calculated at the rate of 9% in accordance with government approval, and as such it is equally against the principle of pleading to allow them the rate of 12% without amendment. We therefore see no reason to interfere with the learned judge's finding on the first two issues, and we affirm the assessment of management fee of $167,266.26 cts. on the basis of the agreed document at page 146 of the Appeal Record.

We now turn to the third issue relating to when the 8% interest on the judgment sum should run. NOVOTEL are claiming from October 30, 1981 – the date of the Ministry's chop on the approval letter dated October 22, 1981. The Senior Assistant Registrar on both occasions, had ordered interest to run from March 23, 1982 – the date of demand by NOVOTEL as pleaded in the statement of claim. The learned judge did not deal with the matter during the first appeal, but during the second appeal he shortened it to January 12, 1984 *i.e.* the date of Senior Assistant Registrar's first judgment under Order 14. No reason is given by the learned judge for his interference in the Senior Assistant Registrar's exercise of discretion under section 11 Civil Law Act 1956. Under that provision the court is entitled to order interest for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. In addition the court also has power under Order 42 rule 12 of the Rules of the High Court 1980 to order interest at 8% per annum or at such other rate not exceeding that rate, calculated from the date of the judgment until the judgment is satisfied. In our view, an appellate court should be slow to interfere with the exercise of discretion in granting interest by a lower court unless the order made is wrong in law or principle such as where the amount of interest awarded is unreasonably high or unreasonably low. [*See Hadmor Productions Ltd. & Ors.* v. *Hamilton & Ors.*][2]. Since no valid reason has been advanced to merit interference with the Senior Assistant Registrar's discretion, and having regard to NOVOTEL's entitlement to payment within 7 days of government approval in October 1981 in accordance with mode of payment provided in Article 6(1), we would set aside the learned judge's judgment on interest and restore the Senior Assistant Registrar's order, which means that the defendants should pay interest on the judgment sum of $167,266.66 cts. at the rate of 8% per annum from March 23, 1982 to date of realisation.

As regards costs we find no reason to interfere with the order made by the learned judge.

Except for the order on interest, we dismiss the appeal. Be that as it may, having regard to all the circumstances of this case, we are of the opinion that the parties to this appeal should bear their own costs. We also order that the deposit be refunded to NOVOTEL.

*Order accordingly.*

Solicitors: *Chua Brothers, Azzat & Xavier; Zain & Co.*

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## RAJINDER KAUR v. JESWANT SINGH

**[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C. JJ.) February 6 & August 2, 1986]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 420 of 1985]**

*Land Law – Caveat – Caveatable interest – No serious question to be tried – Balance of convenience – Status quo – National Land Code, ss. 327 & 323.*

The respondent and the appellant in this case were brother and sister and were directors and shareholders of a family company with two other brothers as directors. The company functioned as a real estate agent. Their father had rendered financial assistance to the company in the form of loan advances.

The appellant decided to purchase a land and house for the sum of $95,000. A sum of $28,500 was advanced by

her father, which was handed to the respondent. The balance was raised by a loan from a bank, to which the property was charged. The land was registered in the name of the appellant. As the appellant was living in Ipoh, she asked her brother to manage the property and gave him a power of attorney. The respondent lodged a private caveat against the land. Subsequently the appellant revoked the power of attorney given to the respondent.

The respondent claimed that he caveated the land as director and agent of the company to protect and give notice of the beneficial and equitable interest of the company in the land. The appellant applied for removal of the caveat. Her application was dismissed in the High Court and she appealed.

**Held**: (1) the duty of the trial judge in this case was to ascertain whether there was a serious question to be tried and that such conflict of evidence need not be disposed of by affidavit evidence only;

(2) there was no evidence of the existence of any trust, express or implied, as alleged in the affidavit in favour of the company;

(3) the affidavits in the case have not raised any serious question to be tried and the balance of convenience does not favour the *status quo* to be maintained until the trial of the action;

(4) an order should therefore be made that the caveat lodged by the respondent be removed forthwith.

*Case referred to:*

(1) *Eng Mee Yong & Co.* v. *Letchumanan* [1979] 2 M.L.J. 212, 216.

SUPREME COURT.

*G. Krishnan* for the appellant.

*Baharuddeen Abu Bakar* for the respondent.

*Cur. Adv. Vult.*

**Syed Agil Barakbah S.C.J.** (delivering the Judgment of the Court) : The appeal before us is against the decision of the learned Judge of the High Court, Kuala Lumpur, dismissing the plaintiff/appellant's motion for the removal of a private caveat entered by the defendant/respondent against the land held under H.S. (M) 764, P.T. No. 4956, Mukim of Cheras, in the State of Selangor (hereinafter called "the said land"). The application was made under Section 327 of the National Land Code on the ground that the respondent has no title or interest that would entitle him to caveat the said land. Leave to appeal against the decision was granted by the learned Judge.

The respondent filed a motion before us for extension of time to file a cross-appeal against the decision of the learned Judge who dismissed his preliminary objection on points of law. The points of law raised in the respondent's affidavit in support of the motion for leave need not be considered separately because they refer ultimately to the same issue in this appeal, *viz.* whether respondent has a caveatable interest in the said land. We decided to proceed with the appeal and directed the counsel for the respondent, *i.e.* the caveator, to submit first.

The relevant facts of the case according to the affidavits of the appellant and that of her father were that the respondent and the appellant are brother and sister and both are directors and shareholders of a family company known as King's Agencies Sdn. Bhd. with two other brothers as directors. The company functions as a real estate agent. Their father from time to time provided financial assistance to the company in the form of loan advances. Some time in the early part of January 1983, negotiations and discussions started for the purchase of the said land and a house standing thereon. Finally, the appellant decided to purchase the property through the Agencies at a price of $95,000. A sum of $28,500 was advanced by her father and handed to the respondent by cash and cheques and the balance of $66,500 was raised by a loan from the Development & Commercial Bank (D & C Bank) by charging the said land with the Bank as security. The title deed to the said land was registered in the name of the appellant on February 17, 1984 and the housing loan from the bank was also taken in her name. She also executed the charge documents as chargor on the same day. The respondent stood as guarantor. As she was then living in Ipoh, she requested her brother to manage the property by collecting rents and paying whatever expenses connected therewith. On November 21, 1984, she appointed the respondent as her power of attorney registered on November 29, 1984 as P/A No. 17095/84. On January 16, 1985, the respondent lodged a private caveat on the said land under Section 323 of the National Land Code. The statutory declaration supporting the respondent's application for lodging the caveat at paragraph 4 states:

"STATUTORY DECLARATION

I, Jeswant Singh s/o Bakhtar Singh (I.C. No. 78762261 of No. 16, 5L/4, Petaling Jaya, Selangor, do solemnly and sincerely declare that:

.....

The said property was registered in the name of the registered proprietors who are also directors and shareholders of

the company as trustees of the company's beneficial interest in and title to the property.

....."

About six months later on July 1, 1985, the appellant revoked the power of attorney by executing a deed of revocation, a copy of which was handed to the respondent with a covering letter (see pages 62 to 64, Volume 3 Record of Appeal). Further correspondence ensued requesting the respondent to remove the caveat, but to no avail.

The respondent in his affidavit stated that he caveated the said land in his capacity as director and agent of the company in order to protect and give notice of the beneficial and equitable interest of the company in the said land. Furthermore, although the title deed was registered in the appellant's name, the said land was purchased from the company's own funds generated from its business activities. It was within the knowledge of the appellant at all material times that she held the said land as trustee of the company for its beneficial and equitable interest in the land.

He further stated that the sale and purchase agreement of the said land was valid and genuine, but the appellant's status as purchaser was subject to the averment stated above. In short, the respondent claimed that the company has a caveatable interest and therefore a right to lodge a caveat in the said land.

The sole question is whether these are sufficient to entitle the respondent to lodge a caveat under section 323(1) (b) of the National Land Code. The section states:

"(1) The persons and bodies at whose instance a private caveat may be entered are:-

(a) .....

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest.

(c) ....."

Under this sub-section, the caveator must show that there is a trust affecting the said land or interest in the said land and the company is beneficially entitled under the said trust.

At this stage however in view of the conflicting affidavit evidence, the duty of the trial Judge is to ascertain whether there is a serious question to be tried and that such conflict of evidence need not be disposed off by affidavit evidence only. (See *Eng Mee Yong & Ors.* v. *Letchumanan*[1]).

In the present appeal, nothing has been shown of the existence of any trust, express or implied, as alleged in the affidavit in favour of the company. Clearly, the respondent's assertion at paragraph 4 of his statutory declaration that "the alleged property were registered in the names of the registered proprietors who are also shareholders and directors of the company as trustees of the company's beneficial interest in and title to the property" cannot be true since it is materially contradicted by his own admission that the property is registered in the name of the appellant. There was no resolution by the company at any meeting of its board of directors to purchase the said land. The entry in the title deed shows a direct transfer from the former registered owner to the appellant personally and below that is another entry on the same date showing a charge of the property by the respondent to the D & C Bank Bhd. (See page 48 of the Appeal Record, Volume 3). No trust caveat has been lodged under section 332 of the National Land Code to indicate that the property is being held by the company in trust.

For the reasons stated above, we do not consider the affidavits in the present appeal have raised any serious question to be tried and the balance of convenience does not favour the *status quo* to be maintained until the trial of the action.

We therefore allow the appeal with costs here and the Court below and make an order that the caveat lodged by the respondent be removed forthwith.

With regard to the cross-appeal, as indicated at the earlier stage, we make no order.

Deposit to be returned to the appellant.

*Appeal allowed.*

Solicitors: *Krishnan & Co.; Baharuddeen & Co.*